SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5545

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SUPREME COURT, U.S.

NORWOOD L. WHITE,

Appellant

vs.

STATE OF NEW JERSEY,

Appellee

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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SUPREME COURT OF THE UNITED STATES

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ON APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

Norwood L. White, the appellant, appeals from the final judgment of the Supreme Court of New Jersey dated 13 March 1979 denying review by way of Certification of appellant's claims that New Jersey's Stolen Property and Multiple-Offender Statutes and New Jersey Court Rule 2:11-3(e)(2) are unconstitutional as violative of U.S. Const. Amend. XIV, Due Process and Equal Protection clauses, and of Amendments V and VI. Additionally, the Multiple-Offender Statute is challenged additionally as being violative of U.S. Const. Amend. VIII.

The challenge to the Court Rule presents a question in common with that presented in Greenberg v. New Jersey, No. 79-239.

OPINIONS BELOW

The Order of the New Jersey Supreme Court is as yet unreported. The opinion of the Superior Court of New Jersey, Appellate Division is as yet unreported and is attached hereto in the Appendix.

JURISDICTION

The judgment of the New Jersey Supreme Court denying Certification was entered on 13 March 1979. A Notice of Appeal to this Court was docketed in the New Jersey Supreme Court on June 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). The Superior Court of New Jersey, Appellate Division, specifically sustained the statutory provisions against appellant's claims of invalidity under the Federal Constitution; the New Jersey Supreme Court denied review of this judgment and additionally denied review of the claim that the challenged Court Rule, first used in the Appellate Division opinion, was invalid under the United States Constitution.

Court Rules of general application are deemed to be "statutes" for purposes of appeal under 28 U.S.C. §1257(2). Lathrop v. Donohue, 367 U.S. 820, 824 (1961), In re Griffiths, 413 U.S. 717 (1971), Mayer v. City of Chicago, 404 U.S. 189 (1971), Marcus v. Search Warrant, 367 U.S. 717, 719-720 (1961).

Failure of the New Jersey Supreme Court to review the Constitutional challenge, timely raised, is equivalent to

sustaining the statutes and rules, Largent v. Texas, 318 U.S. 418, 421-422 (1943), Lawrence v. State Tax Commission, 286 U.S. 276, 282-283 (1932), and this Court's jurisdiction will lie under 28 U.S.C. §1257(2). Validity of the challenged provisions has been sustained for purposes of the appeal statute when the state courts hold the statutes and rules applicable to a particular set of facts as against the contention that such application is invalid on Federal Constitutional grounds. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 292-293 (1921), Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61n.3 (1963), Cohen v. California, 403 U.S. 15, 17-18 (1971).

QUESTIONS PRESENTED

1. Whether N.J.S. 2A:139-1 (Receiving Stolen Property Statute) violates U.S. Const. Amend. XIV, Due Process Clause as applied to permit a statutory inference of guilt to be drawn solely from proof of possession and time.

2. Whether N.J.S. 2A:139-1 violates U.S. Const. Amend. XIV, Due Process Clause as applied because the statutory inference contained therein has not been validated by the judicial system of New Jersey as required by decisions of this Court.

3. Whether N.J.S. 2A:85-12 (Multiple-Offender Statute)

violates U.S. Const. Amends. VI, VIII and XIV, Due Process and Equal Protection Clauses facially and as applied to exact additional punishment only of previous offenders who demand trial of substantive charges; needlessly inhibits resort to jury trials and assistance of counsel, was applied by the trial court as revenge for appellant's exercise of trial rights, and fails to give notice sufficient to satisfy due process.

4. Whether N.J. Court Rule 2:11-3(e)(2) violates U.S. Const. Amends. VI and XIV (due process clause and equal protection clauses) facially and as applied where such rule systematically attacks counsel, allow trials without constitutionally-required judicial findings, obstructs construction of a record necessary to invoke Federal jurisdiction to challenge State Statutes on direct appeal and provides the linchpin of a separate and unequal system of justice.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VIII.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Statute 2A:139-1.

> Any person who receives or buys any goods or chattels, or choses in action, or other thing of value stolen from any other person or taken from him by robbery or otherwise unlawfully or fraudulently obtained, or converted contrary to law, whether the stealing or robbery was committed either in or out of this state and whether the property was received or bought from the thief or robber, or from another person, or who

receives, harbors or conceals any thief or robber knowing him to be so, is guilty of a high misdemeanor.

Possession of such property within 1 year from the date of such stealing, robbery or unlawful or fraudulent obtaining, shall be deemed sufficient evidence to authorize conviction, unless the accused show to the satisfaction of the jury either:

a. That the property, considering the relations of the parties thereto and the circumstances thereof, was a gift to him and not received by him from a minor under the age of 16 years; or

b. That the amount paid by him for the property represented its fair and reasonable value and that it was not received by him from a minor under the age of 16 years; or

c. That when he bought the property he knew or made inquiries sufficient to satisfy a reasonable man, that the seller was in a regular and established business for dealing in property of the description of the property purchased; or

d. That when he received or bought the property, he simultaneously with or before the receipt or sale, reported the transaction to the police authorities of the municipality in which he resided at the time of such receiving or buying and that the property was not received by him from a minor under the age of 16 years; or

e. That before he received or bought the property from a minor under the age of 16 years, he first communicated with the police authorities of the municipality in which he resided and obtained their approval for the purchase, barter, exchange or receipt of possession thereof.

New Jersey Statute 2A:85-12.

Any person convicted on three separate occasions of high misdemeanors in this State, or of crimes under the laws of the United States or any other State or country, which crimes would be high misdemeanors under the laws of this State, or whose convictions for such offenses in this State

or under the laws of the United States or any other State or country shall total three or more, and who thereafter is convicted of a misdemeanor or a high misdemeanor under the laws of this State, is hereby declared to be an habitual criminal, and the court in which such fourth or subsequent conviction is had, may impose upon the person so convicted a sentence in the State Prison for any term of years or for life.

Conviction of two or more of such crimes or high misdemeanors charged in one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

New Jersey Statute 2A:85-13.

If at any time, before sentence, it shall appear that a person convicted of a misdemeanor or a high misdemeanor under the laws of this State has previously been convicted as set forth either in sections 2A:85-8, 2A:85-9 or 2A:85-12 of this Title, and it also appears to the court by whom such person is to be sentenced that the offenses resulting in such conviction are such as to warrant the imposition of a penalty greater than the maximum which may be imposed upon a person convicted of such misdemeanor or high misdemeanor who had not previously been convicted as aforesaid, then the court shall direct the prosecutor of the county in which such conviction was had to file an accusation accusing the said person of such previous convictions. Whereupon, the court in which such conviction was had, shall cause the said person to be brought before it and shall inform him of the allegations contained in such accusation and of his right to be tried as to the truth thereof, and shall require such person to plead to the accusation. If such person refuses to plead or remains silent or pleads not guilty, a not guilty plea shall be entered and a jury shall be impanelled to inquire whether said person is guilty as outlined in sections 2A:85-8, 2A:85-9 and 2A:85-12 of this Title, respectively.

If the jury finds said person guilty or if he pleads

guilty or non vult, the court may sentence him to the punishment prescribed in sections 2A:85-8, 2A:85-9 and 2A:85-12, as the case may be.

The said person shall have the right to waive, in writing, the trial by jury provided in this section, and if he shall do so, the court, in its discretion, may accept the waiver and try and decide the issue without a jury, and if the said person is found guilty, the court may impose the same sentence as though said person had been found guilty by the jury.

New Jersey Court Rule 2:11-3. Opinion, Judgment; Stay After Judgment

. . .

(e) Affirmance without opinion.

. . .

(2) Criminal Appeals. When in a criminal appeal the Appellate Division determines that some or all of the issues raised by the defendant are clearly without merit, the court may affirm by an opinion which, as to such issues, specifies them and quotes this rule and paragraph.

RAISING THE FEDERAL QUESTION

1. The Stolen Property Statute.

By objection at trial to the court's charge and by appropriate trial motions the defense challenged adequacy of the evidence under State and Federal law and of the trial court's charge. Previously, the New Jersey Supreme Court had limited the statutory inference of the Stolen Property Statute authorizing the trial court to withhold from the jury any case of evidence only of stolen property possession plus time.

The trial court rejected the motions.

On direct appeal of right to the Superior Court, Appellate Division, the court was urged to follow decisions of this Court and the New Jersey Supreme Court that the statute and inference could not be applied to the facts of this case without invalidating the statute. Further, argument was made that even if the statutory inference could be applied according to this Court's standards, the underlying inference had been validated by the New Jersey Supreme Court using a less stringent test than that required by this Court and the Due Process Clause, and further, the trial court erred in not charging the statutory defences although evidence to support them was in the case. Without reference

to the decision below and without making findings, the Appellate Division merely held the legal arguments to be "without merit", thus applying the challenged statute in clear violation of published standards and practices clearly promulgated by this Court and the New Jersey Supreme Court, and denying appellant the value of defenses set forth in the statute itself.

2. The Multiple Offender Statute.

The appellant sought dismissal of the multiple-offender charge based on discriminatory, selective enforcement. His effort to build a Federal record to comply with the requirements of 28 U.S.C. §1257(2) were blocked by the trial court which directed the prosecuting authorities not to furnish information and rendered an opinion well knowing that the Administrative Office of the Courts had not responded to efforts by the appellant. In his appeal to the Superior Court, Appellate Division, appellant argued that his attempt to show discriminatory enforcement had been blocked in clear violation of published opinions of the Appellate Division and of this Court and that this was part of a system which invidiously sanctioned only defendants who insisted on standing trial. Without making findings, or even relying on rulings below, the Appellate Division simply held these legal arguments "without merit."

3. New Jersey Court Rule 2:11-3(e)(2)

Use of this Rule first emerged in the Appellate Division opinion. The Rule is part of those applicable only to matters on review in the Appellate Division and Supreme Court. N.J. Court Rule 2:1. Consequently, the first challenge came in a Petition for Certification to the New Jersey Supreme Court citing failure of the Appellate Division to adhere to the Supreme Court Rules. In rejecting review, the Supreme Court, on notice, allowed the Rule to ripen into a linchpin Rule, first challenged in the motion to dismiss the multiple-offender prosecution on Equal Protection grounds, implementing a dual system of justice wherein published rules and precedent are selectively not enforced and in which a coverup rule in a publishable opinion is used all in violation of U.S. Const. Amend XIV, Equal Protection Clause.

This direct appeal followed.

4. The Jurisdictional Statement

Appellant has been represented by the State Office of the Public Defender throughout. Counsel on this appeal was designated by the Public Defender and appeared below in the Appellate Division and New Jersey Supreme Court. The latter rendered judgment on 13 March 1979; notice of same

was not given to counsel by the Public Defender until 27 April 1979, 45 days later. After repeated requests, permission was given by the Public Defender, by telephone, on June 8, 1979, to file a Notice of Appeal which was filed by counsel at his own expense exactly on the last day statutorily allowed for such filing, June 11, 1979. On 14 July 1979 the undersigned was advised by telephone to begin the Jurisdictional Statement. Less than 60 days later, counsel was advised to and did undergo hospitalization and surgery, recuperation from which further delayed this matter.

STATEMENT OF THE CASE

The appellant, Norwood L. White, was indicted on a charge of receiving a stolen television set, knowing the same to have been stolen. At trial, the State's sole proof was that appellant's television set had been stolen from another by persons unknown and that it was found in defendant's possession less than a year later. The putative owner had possessed the set for some time; he testified to purchase cost and to an undifferentiated insurance reimbursement with other stolen articles. The defendant testified that he purchased the set at a flea market for less than an indictable value, and that the set was worth no more than $150. There was a jury issue of value under State law and defendant was absolutely entitled under state law to maintain and have charged to the jury a defense based on the place of purchase. He received none of these.

Following his conviction by the jury, tne trial court directed the State to file a multiple-offender complaint, which was done. Following a bench trial in which the defendant attempted to show that he was being singled out for having stood trial, he was convicted. The maximum sentence for receiving stolen property fixed by statute was three years. However, that sentence was superseded by the multiple-offender

conviction, which could have been true life, and a total sentence of 9-12 years was imposed. A direct appeal to the Superior Court, Appellate Division was denied; review by the New Jersey Supreme Court by way of Certification was denied and this appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

A. The Stolen Property Statute

1. Use of the Inference

Following this Court's decisions in United States v. Gainey, 380 U.S. 63 (1965) and United States v. Romano, 382 U.S. 136 (1965), the Supreme Court of New Jersey validated use of the one-year permissive inference of guilty-knowledge in the Statute by, first, authorizing the trial court to withhold any case from the jury where only evidence of possession and time was presented and, second, setting a requirement of at least some objective indicia that the property belonged to another. In the validating case, the victim's initials were on the objects seized from the convicted person. State v. DiRienzo, 53 N.J. 360, 351 A.2nd 99 (Sup. Ct. 1963).

The trial court, over objection, charged the disputed "element three" - proof of actual knowledge. It did so first by instructing the jury that proof of actual knowledge could include the defendant's actions and statements. Since there was no State's evidence of such, the only statements and actions were of defendant at trial.

The Court went on to say:

> "Now, the evidence which you have received in this case is an explanation of how the Defendant came into possession of the property. Knowledge may be found by you to have existed." (Emphasis supplied). T.66, 5-8.

Shortly thereafter, the court specifically charged that the jury could convict if it found 1) recent possession and 2) absence of a satisfactory explanation. See, T.66-18 to T.67-6.

The excerpted portions of the disputed charge not only transgress the rules laid down in Sandstrom v. Montana, 61 L.Ed. 2d 39, 46-48 (1979), they amounted to a directed verdict against the defendant. United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573 (1977). Neither do they pass muster with this Court's decision in Ulster County Court v. Allen, 60 L.Ed 2d 777 (1979).

The controlling consideration was:

> "In short, the instructions plainly directed the jury to consider all the circumstances tending to support or contradict the inference...and to decide the matter for itself without regard to how much evidence the defendants introduced." Id. at 795.

The State's evidence is summed up by the Prosecutor: The police found the television set in the defendant's home; it was revealed to be stolen; the owner testified it was taken five to six weeks before its recovery. His summation included a statement that it was

> "admitted by Mr. White himself that he had possession of this television set on November 21..." T.52-19 to T.53-6.

The Prosecutor then urged the jury to disbelieve the defendant's explanation because of his prior criminal record and convict him because he did not give a satisfactory explanation. The summation and charge in the face of simple evidence, fairly convinced the jury that the inference was mandatory. Sandstrom, supra, at 51. Even before Sandstrom was decided, appellant argued to the Appellate Division that the only basis for the jury finding had to be the inference; that the New Jersey Supreme Court had construed the statute not to permit conviction on such evidence and that if the Appellate Division permitted conviction, the statute was unconstitutional. The Appellate Division refused to apply the inference constitutionally and invalidity of the statute then was directly presented to the New Jersey Supreme Court, which denied review. Rather than pursue collateral remedies, defendant sought direct review in this Court. See, Ulster County Court v. Allen, supra., at 786-787.

2. Validation of the Inference

In both the Appellate Division and New Jersey Supreme Court appellant argued that the New Jersey Supreme Court formula in DiRienzo for validating the inference employed the general standard, a reasonable exercise of legislative power, not whether reasonable minds could differ. In other

words, it did not decide the issue of probative worth independently and it used a lesser criteria than required by decisions of this Court. The history overlooked by the New Jersey Supreme Court in DiRienzo was crucial to this Court's decision in Ulster County Court v. Allen, supra. This Court explains, at great length, the history behind its requirement that legislative intrusion in the ken of fact-finding be subject to judicial validation especially where validation depends on "accuracy in the run of cases." Id. at n.17. What this Court did not do, but should have done, was tie the requirement for judicial validation to a concept common to rules of evidence which daily govern the use of presumptions and inferences within State court systems.

Although the Legislature may ordain a presumption or inference in New Jersey, the mechanics of all evidentiary applications are found in Chapter III, Rules 13 and 14 of the New Jersey Rules of Evidence (1972). Matters of an evidentiary nature that the court must notice are governed by the concept of Judicial Notice (Chapter II, Rules 9-12).

Analysis of this Court's decisions culminating in Allen and Sandstrom lead ineluctibly to the conclusion that judicial validation of presumptions and inferences is a constitutionally-required evidentiary judicial notice proceeding.

The concept of judicial notice has the capacity to explain to the greatest number of judges, nationwide, what is expected of them in a form that they can apply every day.

Application of the local standard found in New Jersey, Evidence Rule 9(1) discloses an astounding result:

> "Judicial notice shall be taken, without request by a party of...(e) specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute." (emphasis added).

This language embraces the concept embodied in Allen at p.797 n.28 that the judicial validating standard should be both community, not politically based, and supportive of the underlying Constitutional concept of guilt beyond a reasonable doubt.

Plainly stated, the validating standard used by the New Jersey Supreme Court in DiRienzo, not only falls so far short of the standard set by this Court to guide verdicts beyond a reasonable doubt, it also falls far short of the State evidentiary standard. It is wholly unacceptable that the New Jersey Supreme Court should set a standard for Legislative intrusion into the reasonable doubt process that is more liberal than that permitted the judiciary itself. This smacks of an unhealthy affinity between the judicial and the political process; a wholly unacceptable lack of the separation between

the branches heretofore held by this Court to be a fundamental element of due process. Rogers v. Richmond, 365 U.S. 534, 543-545 (1961).

B. The Multiple-Offender Statute

1. Failure of Notice-Retaliation

This challenge is based initially upon the question reserved in Corbitt v. New Jersey, 58 L.Ed.2d 466, 475n.10 (1978). The procedure under the multiple-offender statute, found in N.J.S. 2A:85-13, does not require, and there was no notice of, escalated charges in the original indictment for receiving stolen property. See, Bordenkircher v. Hayes, 434 U.S. 357 (1978). The Supreme Court of New Jersey has held this legal procedure not to involve a separate offense but to be an added penalty (which can be invoked at any time before sentence is imposed). State v. Washington, 47 N.J. 244, 248-249, 220 A.2d 185 (Sup. Ct. 1966). Authority to invoke a penalty without prior notice imparts immediate facial invalidity under U.S. Const. Amend. XIV, Due Process Clause. See, Cole v. Arkansas, 333 U.S. 196 (1948) and Presnell v. Georgia, 58 L.Ed. 2d 207, 211 (1978).

The ultimate argument of invalidity under the notice aspect arises both because the procedure unnecessarily inhibits resort to a demand for plenary jury trial and assistance of

counsel, and unavoidably sanctions those of the appellant's class who do forego insistence upon invocation of their Constitutional rights. It is a direct punishment available only to those who insist on trial. The capacity for retaliation, noted in Corbitt, is manifest in this case because of the pre-trial motion on June 16, 1975 wherein the appellant specifically requested that the trial court disqualify itself on the basis of prejudice and refusal to make a complete record (required by N.J. Court Rule 1:7-3). A multiple-offender penalty is most accurately described as a "collateral penalty" similar to a charge of violating probation laid upon a later conviction. In New Jersey a defendant who bargains a plea cannot thereafter be sandbagged with an additional penalty. State v. Thomas, 61 N.J. 314, 322-324, 294 A.2d 57 (Sup. Ct. 1972), State v. Poli, 112 N.J. Super. 374, 380-381, 271 A.2d 447 (App. Div. 1970). In fact, because the enhanced sentence is actually imposed on the substantive charge itself, imposition of a sentence greater than bargained for allows a defendant an absolute right to withdraw his plea and stand trial. See, N.J. Court Rule 3:9-3 (c),(e). Thus, objectively from the record, invocation by the court of the enhanced penalty prior to the authorized sentence on the substantive charge, could have been based on retaliation for appellant's pre-trial motion and/or exercise of plenary trial rights. There is no way for the record to

eliminate this possibility. Under State law it is plain that expectations in a plea bargain situation, even with a collateral violation of probation, are firm, enforced and known in advance. The State refused to enforce its established policy while applying the challenged statute.

Application of the challenged statute becomes more objectionable when it is realized that coercion of waivers or retaliation for resort to Federal rights is selected as an additional burden for persons having previous criminal convictions. This is the heart of the equal protection claim urged at the trial level. The prior conviction establishes the status classification as leverage for intimidation or retaliation. There is no compelling need for a procedure that needlessly coerces guilty pleas and jury waivers prior to trial, dampens defensive ardor during trial and provides a mechanism to conceal retaliation after the substantive trial on the merits. United States v. Jackson, 390 U.S. 570, 583 (1968).

2. Cruel and Unusual Punishment

Cruel and unusual punishment is a substantial Federal question. It can be said that it is a substantial Federal question of which certain minimum characteristics are agreed, Furman v. Georgia, 408 U.S. 238 (1972).

This Court has had success starting its doctrines at the point where concepts join, most recently in the opinion in Dunaway v. New York, 60 L.Ed 2d 824 (1979).

Appellant urges that the New Jersey multiple-offender law be considered as cruel and unusual punishment in light of identity of the limited standards this Court has associated with both the Eighth Amendment and due process.

Probably the cruelest characteristic of any legal system is institutionalization of the unknown. Notice is the heart of due process as is the opportunity to prepare and defend. Because of the uniqueness of the death penalty, this Court recognized that, even on notice, the death penalty could be cruelly imposed unusually, and that the invalidated statutory schemes institutionalized the unusual nature of the penalty. The key words were arbitrary and capricious.

Responses by States that fell between the extremes of unbridled discretion of Furman and mandatory application, such as Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), have been sustained where decision-making specifically must include a defendant's particular circumstances. Jurek v. Texas, 428 U.S. 262 (1976). See, Gregg v. Georgia, 428 U.S. 153, 188-189 (1976). The heart of the Gregg interpretation of Furman is that death

sentencing procedures posing a substantial risk of application in an arbitrary and capricious manner are invalid. That is a very conservative proposition which states no more than the essence of all due process regardless of the penalty. Indeed, examination of the death penalty cases discloses this Court's concern with the unique (but not socially-unusual) nature of the death penalty was confined to the quantity, quality and individuality of the information provided to the decision-maker. Never has this Court suggested that the core values of due process in the imposition of penalties be limited to death penalty cases.

Had the New Jersey multiple-offender statute included both the death penalty and prior notice, this Court clearly would strike it down.

As it stands, the statute was the only New Jersey penal provision allowing full discretionary range from no application to a true life term of years with no prior notice or standards for invocation. Examination of this Court's death penalty cases discloses that arbitrary and capricious sentencing involves the Eighth-Amendment core concept of expectation which is the common denominator of the due process element of notice. The Eighth Amendment question is important because it affects not only the notice due a defendant in the New Jersey context, but the information presented to the trier of fact; how the

proceeding is initiated, and the identity of the trier of fact: in New Jersey the trial court directs the filing of the complaint. It then may be trier of fact or at least trial judge. It is hardly likely that the statutorily-mandated penalty trial will result in an acquittal. Recusal of a complainant-judge has received remedial treatment. New Jersey has, for some time, provided that another judge hear litigant relief or contempt show-cause orders signed by the first judge. See, N.J. Court Rule 1:10-5; In re Bridge, 120 N.J. Super. 460, 295 A.2d 3 (App. Div. 1972), certification denied, 62 N.J. 80, 299 A.2d 78 (Sup. Ct. 1972).

With complete discretion on range of penalty; identity of complainant and trial judge, lack of prior notice, chilling effect on fundamental defense rights, and extreme capacity for judicial retaliation, the New Jersey multiple-offender law is unusual even by State standards and certainly not consonant with the core concepts common to due process. The importance of the Federal question lies in the request to this Court to apply both the core values common to due process and extend Eighth Amendment protection by requiring the same internal controls on sentencing procedure that allowed this Court to validate administration of death penalties.

C. N. J. Court Rule 2:11-3(e)(2)

Resort to this Rule by the courts of New Jersey first was made in the opinion of the Appellate Division, the last appellate court of direct review of right. Under N.J. Const. Art. VI § 3 the Supreme Court and Appellate Division have limited original jurisdiction. This is implemented by N.J. Court Rule 2:10-5 in essentially the same language.

The first Constitutional objection is that the challenged rule allowed the Appellate Division to create an incomplete record of its own authority to act. Neither the Rule nor its application in this case make reference to specific record acts of the court below. Consequently, the Appellate Division did not "affirm for the reasons below." The most that the record completely discloses, and that the Rule requires on its face, is that the Appellate Division held the naked legal propositions to be wholly without merit, without reference to the facts of the case. Because the lower court obstructed presentation of the Equal Protection claim and ruled upon some evidentiary matters where judicial findings were involved, the least impact that use of the challenged rule exerts is the open question whether the Appellate Division made an independent determination of some or all such issues without so specifying or making a record. The first infirmity, denial

of pure law, will be significant in later argument herein.

Deliberate policies, implemented to obscure a record of the court's actions and authority, have been held by this court not to comply with Due Process. See, eg., Norvell v. Illinois, 373 U.S. 420 (1963), Draper v. Washington, 372 U.S. 487 (1963), Hardy v. United States, 375 U.S. 277 (1964), and see Commonwealth v. Anderson, 441 Pa. 483, 272 A.2d 887, 882 (Sup. Ct. 1971). The historic source of judicial legitimacy in Western culture is not the result that obtains but the authority for a decision. Precedent, the requirement that an exercise of power be justified and limited areas of discretion, are the differences between judicial and legislative action. Absence of these qualities is a fundamental absence of Due Process highlighted by the difficulty presented to counsel who must justify the invocation of limited jurisdiction by higher State judicial authority; ultimately, direct resort to limited-jurisdiction Federal judicial authority, and where the record of questions presented and ruled upon have jurisdictional significance.

While ostensibly enacted on May 19, 1975 to facilitate disposition of the Appellate Division workload, the challenged Rule has no external or internal control over the method of its use. Its excessive broadness, and use herein to mask, obscure, and whitewash one of the most egregious trial records

possible, is not the allowable due process correction constitutionally contemplated by judicial review. Frank v. Mangum, 237 U.S. 309, 335, 336-337 (1915), Moore v. Dempsey, 261 U.S. 86, 91 (1923). This rule suffers facial invalidity because of its lack of control or mechanism to review validity of its use, as applied in this case, as noted above and following.

The very wording of the challenged Rule is suspect. Counsel on the appeal was and is a Member of the New Jersey Bar. Application of the challenged Rule by the Appellate Division accuses defense counsel in criminal appeals of professional misconduct for resorting to established law and precedent or making good faith arguments for extention, modification or reversal of existing law by the mere sweep of the pen. DR7-102 (A)(2). Criminal appellate practitioners receiving a pattern of these "one-liners" are open to charges of professional neglect. DR6-101(A)(2).

Scapegoating criminal defense lawyers at least to facilitate the calendar and at most to obscure disgraceful trial records below is a direct attack upon effective assistance to clients by counsel at the appellate level which undermines counsel at the trial level in violation of the U.S. Const. Amends. V, VI and XIV, Due Process and Equal Protection clauses.

All of the foregoing flow into the final infirmity of the challenged Rule. Under N.J. Court Rule 1:36-2 the

publishability of opinions and hence their incorporation into the formal jurisprudence of the State is controlled by standards authorized by the New Jersey Supreme Court. Standards for Publication-Judicial Opinions (May 2, 1974); Manual of Style - Judicial Opinions (May 2, 1974).

Under those standards, right or wrong, oral trial court opinions are not publishable nor can they be referred to in published opinions. On the other hand, Appellate Division opinions are always in publishable format; ultimately publication may be decreed, perhaps years later, by the Committee on Opinions. It states the obvious that, published or not, a plenary opinion rejecting propositions of law settled by this Court, the New Jersey Supreme Court or the Appellate Division and simply refusing to follow them would devastate the judicial system, especially if rejections were applied only in certain cases.

That judicial action occurred in this case. The Appellate Division did not adopt opinions of the trial court and the Rule does not require that it do so. The Appellate Division opinion made no attempt to distinguish argued application of settled legal principles, as, for instance through the doctrine of harmless error. It does not disclose the precise arguments advanced, and it does not disclose that

serious Federal Constitutional arguments were advanced (except in paragraphs 5 and 6).

The Equal Protection challenge was ripened by failure of the New Jersey Supreme Court to enforce its own discipline. The rule in New Jersey is that lower courts may disagree with, but must follow the pronouncements of superior appellate courts. Reinauer Realty Corp. v. Paramus, 34 N.J. 406, 415, 169 A.2d 814 (Sup. Ct. 1961), In re Arens, 41 N.J. 364, 370, 197 A.2d 1 (Sup. Ct. 1964), State v. Smith, 169 N.J. Super. 98, 100 _____A.2d_____ (App. Div. 1979), State v. Steffanelli, 133 N.J. Super. 512, 514, 337 A.2d 625 (App. Div. 1975). The Supreme Court of New Jersey is the last word. It has original jurisdiction on appeal, sole responsiblity both for making the rules of procedure and for review of all causes, procedural and substantive. N.J. Const. Art. 6 § 1 par. 1, Art. 6 § 2 par. 2, Art. 6 § 5 par. 1, Art. 6 § 5 par. 3 (1948), Winberry v. Salisbury, 5 N.J. 240, 245-248, 74 A.2d 406 (Sup. Ct. 1950). That is where the buck stops. By failure to act, the Supreme Court of New Jersey has permitted its Rule to be used by the Appellate Division as a linchpin to cover up the Equal Protection infirmity of the multiple-offender law raised as early as a motion to dismiss in the trial court, and to make this discriminatory system effective, has allowed a discriminatory, alternative system of justice, free of the entire body of

formal jurisprudence and precedent, to operate in the balance of the matters presented for appellate review.

In addition to countenanced departure from construction of the Stolen Property Statute, it permitted the Appellate Division to deny, out of hand, as a matter of law, a lamentable catalog of error rising to mistrial proportions of State and Federal dimensions.

There is no way that a civilized judicial system can tolerate systematic deprivation of the State-granted right to have appellate cases decided on the basis of law and the record presented to the reviewing court.

Like every judicial system in the United States, the New Jersey Court System has been presented with acknowledged problems.

The growth of the criminal trial calendar with inevitable pressure to move the cases creates consequent pressure on the appellate calendar. The remedy of reversal simply feeds additional cases back to the trial level. However, this Court cannot permit the paradox of guaranteeing criminal defendants a lawyer only to have the State take away the court from those who seek its aid. The paradox is that the defendant is involuntarily tried below; he appeals voluntarily. That is what has happened here. The trial is conducted in open court,

with counsel and with such punctilio as can be mustered. But because there is review of right and an appellate court ultimately must dispose of the case, counsel is effectively taken away both at the appellate level and retroactively in the trial court where there is no reference to rulings upon the exact record including Federal claims, made below. The net result is an appellate process converted to a laundry operation and conversion of the trial process to a show trial because whatever occurred below is meaningless above. At that point, this Court must decide not only whether the basic right to a fair trial has been destroyed but whether selectivity is permitted in the destruction process.

The trial record in this case is not one on which abbreviated review can be justified. For that reason abbreviated review smacks not simply of a failure by the New Jersey courts to accord appellant a fair trial but of selective cover-up for a fundamentally-bad one. N.J. Court Rule 2:11-3(e)(2) is not used in all cases where objections are overruled at the appellate level. There is no criteria nor case law to guide application when it is to be used. It is the true bureaucratic dead end. It is a tautology. An argument has no merit because it has no merit.

The challenged Rule is the linchpin of a dual system of justice, separate, unequal and destructive of fundamental due process. This is the most substantial Federal claim involving a State judicial system that can be made.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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